

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 612

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Hays

SUBJECT: Preference in the Award of State Contracts

DATE: March 6, 2014 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McVaney	GO	Fav/CS
2.			CA	
3.			JU	
4.			AP	

Please see Section IX. for Additional Information:
COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 612 specifies that an existing preference for Florida-based businesses that currently applies to public entity purchases of personal property also applies to the purchase of construction services. The bill also provides that the state preference preempts any local preference ordinance or regulation in procurements for personal property or construction services in which any state-appropriated funds are spent.

The bill also creates a new section in Chapter 287, F.S., requiring state agencies to report contract problems, fines, defaults, and terminations to the DMS, and for DMS to maintain a vendor complaint list, a suspended vendor list, and a terminated vendor list. Agencies must consider the fact of a vendor's status on any of the lists in evaluating competitive solicitations. Local governments may participate in the vendor reporting provisions.

II. Present Situation:

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹ procurement of personal property² and services. The Department of Management Services (DMS) is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.³ The DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁴

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁵

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposal, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.⁶ Section 287.012(6), F.S., provides that competitive solicitation means "the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement."

Local governmental units are not subject to the provisions of chapter 287, F.S.

¹ Section 287.012(1), F.S., defines agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

² "Personal property" is not independently defined for purposes of Ch. 287, F.S., but the chapter title for Chapter 287, F.S., is "Procurement of Personal Property and Services." Additionally, the definition of "commodity" in s. 287.012(5), F.S., is "any of the various supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property, including a mobile home, trailer, or other portable structure that has less than 5,000 square feet of floor space, purchased, leased, or otherwise contracted for by the state and its agencies." This definition is used in Part I of Ch. 287, F.S., "Commodities, Insurance, and Contractual Services."

³ See ss. 287.032 and 287.042, F.S.

⁴ *Id.*

⁵ See ss. 287.012(6) and 287.057, F.S.

⁶ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

Vendor Reporting

The DMS has some limited general authority in terms of policing vendors that aren't adequately performing their contractual duties. The DMS currently maintains a convicted vendor list, suspended vendor list, and a vendor complaint list.⁷ The DMS must maintain the convicted vendor list pursuant to s. 287.133, F.S., which prohibits persons convicted of public entity crimes from being awarded contracts, and requires the DMS to place people on the list using an administrative process.⁸ The DMS maintains the suspended vendor list pursuant to its general authority to "remove from its vendor list any source of supply which fails to fulfill any of its duties specified in a contract with the state."⁹ The suspended vendor list consists of vendors whose contracts have been found in default by state agencies.¹⁰ The vendor complaint list consists of all formal vendor complaints issued to vendors by state agencies and received by the DMS.¹¹ There appears to be no general statutory requirement mandating that agencies formally report to the DMS when agencies experience problems with vendors, or terminate vendors due to contract nonperformance.

Though s. 287.133, F.S., allows the DMS to place persons convicted of public entity crimes against political subdivisions on the convicted vendor list, when political subdivisions terminate vendors for cause due to contract nonperformance issues, there is no statutory requirement mandating the reporting of such actions to the DMS.

Contract Tracking

Pursuant to s. 215.985(14), F.S., the Chief Financial Officer (CFO) is required to establish and maintain a publically-available contract tracking system. Within 30 days of contract execution, each state entity must submit specified information to the CFO's website.¹² The information to be posted must include:

- The names of the contracting entities.
- The procurement method.
- The contract beginning and ending dates.
- The nature or type of the commodities or services purchased.
- Applicable contract unit prices and deliverables.
- Total compensation to be paid or received under the contract.

⁷ The lists are posted on the internet at:

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists

⁸ As of March 7, 2014, nobody is listed on the convicted vendor list, available at

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/convicted_vendor_list.

⁹ Section 287.042(1)(b), F.S. The administrative rule implementing this authority is Rule 60A-1.006(2), F.A.C.

¹⁰ As of March 7, 2014, there are 85 vendors on the suspended vendor list, available at

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/suspended_vendor_list.

¹¹ As of March 7, 2014, four vendors are on this list, located at

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/vendor_complaint_list.

¹² The system is called the Florida Accountability Contract Tracking System (FACTS), available at

<https://facts.fldfs.com/Search/ContractSearch.aspx>

- All payments made to the contractor to date.
- Applicable contract performance measures.
- If a competitive solicitation was not used to procure the goods or services, the justification of such action, including citation to a statutory exemption or exception from competitive solicitation, if any.
- Electronic copies of the contract and procurement documents that have been redacted to exclude confidential or exempt information.

Florida In-state Preference

State agencies, universities, colleges, school districts, and other political subdivisions are required to grant a preference in the award for contracts for the purchase of personal property, when competitive solicitation is required and when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in another state, or political subdivision of that state.¹³ The preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state.

If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida based vendors.¹⁴

A vendor whose principal place of business is outside of this state must submit with the bid, proposal, or reply documents a written opinion of an attorney at law licensed to practice law in that foreign state as to the preferences, if any, granted by the law of that state to a business entity whose principal place of business is in that foreign state.¹⁵

Florida's preference law does not apply to transportation projects for which federal aid funds are available,¹⁶ or to counties or cities.¹⁷ It also does not apply in the award of contracts for the purchase of construction services.

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. The department is responsible for establishing by rule the following:¹⁸

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;

¹³ Section 287.084(1)(a), F.S.

¹⁴ *Id.*

¹⁵ Section 287.084(2), F.S.

¹⁶ Section 287.084(1)(b), F.S.

¹⁷ Section 287.084(1)(c), F.S.

¹⁸ Section 255.29, F.S.

- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities those contracts are determined to be in the best interest of the state.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.¹⁹ Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.²⁰

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Weekly²¹ at least 21 days prior to the established bid opening. If the construction project is projected to exceed \$500,000, the advertisement must be published at least 30 days prior to the bid opening in the Florida Administrative Weekly, and at least once 30 days prior to the bid opening in a newspaper of general circulation in the county where the project is located.²²

Florida Preference to State Residents

Section 255.04, F.S., provides that every board of the state, county, or municipality that is charged with the duty of erecting or constructing any public administrative or institutional building must give preference, in the purchase of material and in letting contracts for the construction of such building, to materialmen, contractors, builders, architects, and laborers who reside within the state whenever such material can be purchased or the services or such materialmen, contractors, builders, architects, and laborers can be employed at no greater expense than that which would obtain if such purchase was made from, or contract let, or employment given to a person residing outside of the state.

Another statute provides a preference for the employment of state residents in construction contracts funded by money appropriated with state funds. Such contracts must contain a provision requiring the contractor to give preference to the employment of state residents in the performance of the work if state residents have substantially equal qualifications²³ to those of non-residents.²⁴ If a construction contract is funded by local funds, the contract may contain such a provision.²⁵ In addition, the contractor required to employ state residents must contact the

¹⁹ See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

²⁰ See s. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

²¹ The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

²² For counties, municipalities, and political subdivisions, similar publishing provisions apply. Section 255.0525(2), F.S.

²³ Section 255.099(1)(a), F.S., defines substantially equal qualifications as the “qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons.”

²⁴ Section 255.099(1), F.S.

²⁵ *Id.*

Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.²⁶

III. Effect of Proposed Changes:

Procurement Preferences

The bill amends s. 287.084, F.S., the existing preference to Florida businesses in the purchase of commodities and services in Ch. 287, F.S., by applying the preference to construction services, and expanding the application of the preference to counties and municipalities for both purchases of personal property as well as construction services. The current law and the proposed change do not apply to transportation projects funded by federal aid.

The bill adds a preemption provision that applies to any competitive solicitation in which payment for personal property or construction services is to be made partially or wholly from state-appropriated funds. The provision applies to any local ordinance or regulation that restricts a contractor who possesses a certificate of competency issued by the Department of Business and Professional Regulation²⁷ from competing for an award based upon:

- The vendor maintaining an office or place of business within a particular local jurisdiction;
- The vendor hiring employees or subcontractors from within a particular local jurisdiction; or
- The vendor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

In any solicitation subject to this provision, the public entity must disclose in the solicitation whether payment will come from state-appropriated funds, the amount of such funds, and the percentage of such funds compared to the total cost.

State Vendor Reporting

The bill creates s. 287.1335, F.S., to require that agencies report to DMS on certain actions taken with contract vendors. Local governmental entities are permitted, but not required, to report these vendor actions to the DMS.

The DMS is required to compile and maintain the following 3 lists, and provide public access to the lists through its website:

- A "suspended vendor list" of all vendors whose ability to bid or perform state or local government contracts has been temporarily suspended by an agency or a participating local governmental entity due to a contract default by the vendor or for other good cause.
- A "terminated vendor list" means a list of all reported vendors whose contracts have been terminated by an agency or a participating local governmental entity due to a contract default by the vendor or for other good cause.
- A "vendor complaint list" means a list of complaints that have been issued to vendors by an agency or participating local governmental entity.

²⁶ Section 255.099(1)(b), F.S.

²⁷ Section 489.105(8), F.S.

Agencies must, and local governmental entities may, provide the DMS with copies of complaints issued to vendors and the names of suspended and terminated vendors for the vendor complaint list, the suspended vendor list, and the terminated vendor list, respectively. Agencies must, and local governmental entities may, report quarterly to the DMS with updated information necessary to maintain the lists. Agencies must report to the DMS all instances of a material breach of a contract or a notice of default and subsequent termination within 30 days after such occurrence.

Agencies must require that a vendor responding to a competitive solicitation disclose whether the vendor has, within the previous 5 years, had a contract terminated by a federal, state, or local governmental entity after defaulting on a contract; paid a fine or penalty incurred by nonperformance of a federal, state, or local government contract; or entered into an agreement with a federal, state, or local governmental entity in settlement of any issues related to default or nonperformance of a contract. An agency may consider a vendor's failure to disclose such information in determining whether the vendor is in breach of any resulting contract. Local governmental entities may require such disclosures.

When evaluating bids, proposals, or replies to competitive solicitations, an agency must consider information available on the three lists in determining whether the vendor submitting a response to the competitive solicitation is a responsible and responsive vendor. If an agency enters into a contract with a vendor on any of the three lists, the contract file must contain documentation specifying that the agency's designee with authority to sign the contract was aware that the contracted vendor was named on the list at the time the contract was initially entered into.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Sec. 18, of the Constitution of the State of Florida excuses local governments from complying with state mandates that impose negative fiscal consequences. Subsection (a) provides, "No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds" unless certain requirements are met. However, several exemptions and exceptions exist. The exceptions to the constitutional provision include a legislative determination that the law fulfills an important state interest and one of the following relevant conditions: (a) the law requiring such expenditure is approved by 2/3 of the membership of each chamber or (b) the expenditure is required to comply with a law that applies to all persons similarly situated.

In this instance, the bill does not contain a legislative determination that the bill fulfills an important state interest. However, the law, as amended, will apply to all state and local governmental entities in Florida. Arguably, any expenditure required by this bill will be required to comply with a law that applies to all persons similarly situated.

Subsection (d) of Art. VII, Sec. 18, of the State Constitution exempts those laws that have an insignificant fiscal impact from the requirements of the mandates provision. Whether a particular bill results in a significant impact on cities and counties must be determined on an aggregate, statewide basis. Laws determined to have an “insignificant fiscal impact,” which means an amount not greater than the average statewide population for the applicable fiscal year times \$0.10 (\$1.9 million for FY 2013-2014²⁸), are exempt.²⁹

The Revenue Estimating Conference has not met on this bill, so the financial impact is unknown at this time. If the overall aggregate fiscal impact on cities and counties exceeds \$1.9 million per year, the bill, to be binding on all cities and counties, must meet the relevant conditions as an exception to the constitutional requirements.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Commerce Clause

The U.S. Constitution provides that Congress shall have the power to “regulate commerce... among the states.”³⁰ The Commerce Clause acts not only as a positive grant of powers to Congress, but also as a negative constraint upon the states.³¹ When a state or local government is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause.³² A state is considered to be a “market participant” when it is acting as an economic actor such as a purchaser of goods and services.³³ Since the state is acting as a “market participant” under this bill, the in-state preference provisions herein are likely to be upheld as an exception to the Commerce Clause.

²⁸ Based on the Demographic Estimating Conference’s final population estimate for April 1, 2014, which was adopted on February 10, 2014. The Executive Summary can be found at:

<http://edr.state.fl.us/Content/conferences/population/demographicssummary.pdf> (last visited on February 28, 2014).

²⁹ See Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Fiscal Impact*, (September 2011), available at: <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf> (last visited on March 5, 2013).

³⁰ U.S. Const. art. I, s. 8, cl. 3.

³¹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

³² *National Collegiate Athletic Ass’n v. Associated Press*, 18 So.3d 1201, 1211-1212 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579).

³³ *Id.*

Equal Protection Clause

The United States Constitution provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.”³⁴ The expansion of the in-state preference provisions in this bill may constitute an equal protection violation. If such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.³⁵ Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.³⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Due to the expansion of the Florida business preference to construction services, Florida-based businesses might obtain more public contracts.

C. Government Sector Impact:

Indeterminate. The application of the 5 percent Florida preference to construction contracts theoretically could increase costs of those projects, and the offsetting secondary economic benefits of awarding more contracts to Florida-based businesses are difficult to determine in advance.

The economic effects caused by preemption of local preference ordinances would be difficult to calculate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill amends a current preference applicable to purchases of personal property, located in Ch. 287, F.S., to apply to purchases of construction services. Public construction contracting is regulated in Ch. 255, F.S., which also includes two existing preferences. The construction preference would be better placed in Ch. 255, F.S.

The DMS probably needs rulemaking authority to implement the vendor reporting requirements.

³⁴ U.S. Const. amend. XIV, s. 1; *see also* FLA. Const. art. I, s. 2.

³⁵ *Nordlinger v. Hahn*, 505 U.S. 1, 33-34 (1992) (stating that a “classification rationally furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.”)

³⁶ *Id.*

The requirement that agencies consider in competitive solicitations whether a vendor is listed on any of the three vendor action lists could offer another avenue for aggrieved vendors to attack agency actions in procurement protests.

Principal Place of Business

Current law does not provide for a definition of “principal place of business.” There are two competing tests to determine where a company’s principal place of business is located.

The first is the “substantial predominance” test, which analyzes the following criteria: the location of its employees, where sales took place, its production activities, its tangible property, its sources of income, the value of land owned and leased, and the replacement cost of assets located in a certain state.³⁷

The second test is the “nerve center test.” Under this test, a company’s principal places of business refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.³⁸ The Department of Management Services has previously utilized the “nerve center” test to determine the company’s principal place of business.³⁹

VIII. Statutes Affected:

This bill substantially amends sections 215.985 and 287.084 of the Florida Statutes.

The bill creates section 287.1335 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on March 6, 2014:

The CS adds a new section requiring state agencies to report contract problems, fines, defaults, and terminations to the DMS, and for DMS to maintain a vendor complaint list, a suspended vendor list, and a terminated vendor list. Agencies must consider the fact of a vendor’s status on any of the lists in evaluating competitive solicitations. Local governments may participate in the vendor reporting provisions.

³⁷ *Ghaderi v. United Airlines, Inc.*, 136 F.Supp.2d 1041, 1044-46 (N.D. Cal 2001).

³⁸ *Hertz Corp v. Friend et al.*, 130 S.Ct. 1181 (2010).

³⁹ In a 2010 memorandum to purchasing directors, the department indicated it intended to use the nerve center test when applying the Florida based business preference found in s. 49 of Ch. 2010-151, L.O.F., to both state term contracts and other department issued solicitations. Memorandum to Purchasing Directors, Department of Management Services, September 2, 2010 at 3.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
